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EDITOR'S COMMENTS

Welcome to the second installment of Volume 3 of *The Quarterly Review* (QR). The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. The QR is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding the QR can be directed to Mr. Cauthen at (912) 267-2179. Should you wish to join the QR Mailing List and have the QR delivered directly to you via electronic mail attachment, please provide your current e-mail address to Mr. Cauthen. Copies of the current and past issues of the QR can be viewed by visiting the Legal Division web page. This volume of the QR may be cited as "3 QUART. REV. ed. 2 (2002)".

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THE U.S. PATRIOT ACT of 2001
CHANGES TO ELECTRONIC SURVEILLANCE LAWS

Bryan R. Lemons
Branch Chief

Shortly after the terrorist attacks that occurred on September 11, 2001, Congress passed the "**U**niting and **S**trengthening America by **P**roviding **A**ppropriate **T**ools **R**equired to **I**ntercept and **O**bstruct **T**errorism," commonly referred to as the "U.S. Patriot Act of 2001." The purpose of this article is to highlight some of the resulting major changes in electronic surveillance laws. This article is not intended to be a comprehensive summary of all of the changes brought by the legislation.

I. TERRORISM AS A PREDICATE OFFENSE

Title 18 U.S.C. § 2516 lists the predicate offenses for which wire, oral, or electronic intercept orders may be authorized, upon a showing of probable cause to believe the offense is being committed. "The offenses that may be the predicate for a wire or oral interception order are limited to only those set forth in … § 2516(1)."[1] With passage of the "U.S. Patriot Act," crimes "relating to terrorism" have now been made predicate acts for wire or oral interception orders, as have offenses "relating to chemical weapons."[2]

II. PEN REGISTERS AND TRAP AND TRACE DEVICES

Title 18 U.S.C. §§ 3121 – 3127 outline the federal requirements for use of pen registers and trap and trace devices.[3] Prior to passage of the "U.S. Patriot Act," the statutory definitions of these two devices did not explicitly allow for their use to capture Internet communications, such as capturing the "To" and "From" information contained in an e-mail header. The "U.S. Patriot Act" modified these definitions, and they now expressly authorize utilization of pen registers and trap and trace devices on Internet communications. Further, Title 18 U.S.C. § 3123(a) previously allowed for the issuance of a court order authorizing a pen register or trap and trace device only "within the jurisdiction" of the issuing court. The "U.S. Patriot Act" now allows for a court to issue a single order that is valid "anywhere within the United States."[4]

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[1] *United States Attorney's Manual*, Title 9, Criminal Resource Manual 28.
[2] Title 18 U.S.C. § 2516(1)(q)
[3] "A pen register records outgoing addressing information (such as a number dialed from a monitored telephone), and a trap and trace device records incoming addressing information (such as caller ID information)." *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* at 148, Computer Crime and Intellectual Property Section, Criminal Division, Department of Justice (2001)
[4] Title 18 U.S.C. § 3123(a)(1)

III. VOICE MAIL STORED WITH THIRD PARTY PROVIDER

Title 18 U.S.C. § 2510(1) included within its definition of "wire communication" the phrase "any electronic storage of such communication." Additionally, the Electronic Communications Privacy Act of 1986 (ECPA) addressed law enforcement access to stored "electronic" communications held by a third party provider, but not stored "wire" communications. Thus, voice mail stored with a third party provider could not be obtained by a law enforcement officer with a search warrant (as could "electronic communications"), but required a Title III interception order. The "U.S. Patriot Act" amended the ECPA, and now authorizes law enforcement officers to use search warrants to compel disclosure of voice mail stored with a third party provider. This provision of the "U.S. Patriot Act" will expire on December 31, 2005.

IV. COMPUTER HACKING INVESTIGATIONS

Prior to passage of the "Patriot Act," investigators were not permitted to obtain interception orders for wire communications in computer hacking investigations. Title 18 U.S.C. § 2516(1) has now been amended to include violations of Title 18 U.S.C. § 1030 (Computer Fraud and Abuse) as predicate offenses. However, this provision of the "U.S. Patriot Act" will expire on December 31, 2005.

V. OBTAINING INFORMATION FROM THIRD PARTY PROVIDERS WITH A SUBPOENA

Title 18 U.S.C. § 2703 outlined the information a law enforcement officer could obtain with a subpoena from a third party provider of electronic communication (e.g., AOL). Termed "basic subscriber information," it included a customer's name, address, local and long distance telephone toll billing records, etc.[5] Other types of information, such as credit card numbers used, could only be obtained with a search warrant or § 2703(d) court order. The "U.S. Patriot Act" expands "basic subscriber information" to now include "means and source of payment for such service (including any credit card or bank account number)," "records of session times and durations," and "telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address."[6]

VI. SEARCH WARRANTS FOR WIRE AND ELECTRONIC COMMUNICATIONS HELD BY THIRD PARTY PROVIDER

Prior to passage of the "U.S. Patriot Act," the ECPA required that law enforcement officers use a search warrant to compel a third party provider of electronic communications to disclose communications in storage "for one hundred and eighty days or less."[7] Pursuant to Rule 41 of the Federal Rules of Criminal Procedure, only a court in the district where the actual communication was located could issue this search warrant. Now, any court "with jurisdiction over the offense under investigation" can issue a nationwide search warrant for communications stored by third party providers, regardless of where the communication is physically located. And, as noted in paragraph III, above, "wire communications" are now covered by this rule. This provision of the "U.S. Patriot Act"

[5] Title 18 U.S.C. § 2703(C)
[6] Title 18 U.S.C. § 2703(c)(2)
[7] Title 18 U.S.C. § 2703(a)

will expire on December 31, 2005.

VII. DELAYED NOTICE OF SEARCH WARRANTS

Title 18 U.S.C. § 3103a has been amended to permit law enforcement officers to delay notice of the execution of a search warrant in special circumstances. Specifically, § 3103a permits notice to be delayed in situations where "the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result." An "adverse result" is defined as (a) endangering the life or physical safety of an individual; (b) flight from prosecution; (c) destruction of or tampering with evidence; (d) intimidation of potential witnesses; or (e) otherwise seriously jeopardizing an investigation or unduly delaying a trial."[8]

Bryan Lemons, a frequent contributor to The Quarterly Review*, is a Branch Chief for the Legal Division at the Federal Law Enforcement Training Center. Prior to joining the Legal Division, Mr. Lemons served in the U.S. Marine Corps from 1989 to 1999. He is a graduate of the St. Louis University School of Law (J.D., 1992).*

UPDATE ON THE FEDERAL JUVENILE DELINQUENCY ACT
18 U.S.C. § 5033

Former Legal Division Intern, Joey Caccarozzo, wrote an article for the October 2001 *The Quarterly Review* on Juvenile *Miranda* Rights under the Federal Juvenile Delinquency Act. There is another recent circuit court case which found a violation of the Act, resulting in the suppression of a confession.

In ***U.S. v. Female Juvenile (Wendy G.)***, 255 F.3d 761 (9th Cir. 2001**)**, the agent called the juvenile's mother within one hour of the arrest on drug charges. The agent informed the mother of the charges and her daughter's *Miranda* rights. When the mother asked where and when she could speak to her daughter, the agent gave her directions to the Federal Building and the time the next day when her daughter would be there. The mother was not told she could talk with her daughter before questioning. The agent got the juvenile's *Miranda* waiver and her confession to drug smuggling. Trial testimony indicated that if the mother had been allowed to speak to her daughter before the interview, she would have advised her not to talk to the agent.

The court held that the agent's failure to inform the mother that she could confer with her daughter before any interrogation violated the Act's requirement to give juveniles "access to meaningful support and counsel." The court concluded that the violation of the Act caused the confession, which was highly prejudicial. The confession was suppressed.

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[8] Title 18 U.S.C. § 2705(a)(2)

CASE BRIEFS
UNITED STATES SUPREME COURT
and CIRCUIT COURT UPDATES

SUPREME COURT

U.S. v. Arvizu
00-1519
January 15, 2002

SUMMARY: Reasonable suspicion, a "particularized and objective basis" for suspecting legal wrongdoing, justifies a brief investigatory stop. Whether the detaining officer has reasonable suspicion depends upon the "totality of the circumstances" of each case. Officers may draw upon their own experiences and specialized training to make inferences from and deductions about the cumulative information available.

FACTS: While driving with his wife and children during the afternoon on an unpaved road in a remote area of southeastern Arizona, defendant was stopped by a Border Patrol Agent. A subsequent consent search of the vehicle revealed almost 130 pounds of marijuana worth close to $100,000.00. He was charged with possession with intent to distribute.

ISSUE: Did the Border Patrol Agent have reasonable suspicion to stop the car, making the subsequent consent voluntary and discovery of the drugs lawful?

HELD: Yes.

DISCUSSION: The Ninth Circuit evaluated each factor independent of the others and determined that some, such as the driver's stiff and very rigid posture, his failure to look at the agent as he passed, the unusually high knees of the two children sitting in the very back seat, and the way that all of the children, though still facing forward, put their hands up at the same time and began to wave at the agent in an abnormal pattern, were susceptible to innocent explanation and were, therefore, entitled to no weight. They concluded that the remaining factors did not establish reasonable suspicion. The Supreme Court held that in determining reasonable suspicion, courts must look at the "totality of the circumstances." Although each of the factors alone is susceptible to innocent explanation, and some may be more probative than others, taken all together, and considered in light of the officer's training and experience, they formed a particularized and objective basis for stopping the vehicle.

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1ST CIRCUIT

U.S. v. Scott
270 F.3d 30
October 30, 2001

SUMMARY: Reasonable suspicion of the fraud of attempting to pass a bad check, although sufficient to justify an investigative detention under *Terry*, does not alone amount to a suspicion that the suspect is armed and dangerous sufficient to justify a frisk.

FACTS: Scott drove Stephens, a codefendant, to a Circuit City store where Stephens attempted to pay for a purchase by check. Stephens identified himself to a store employee as Thomas Judge and presented an identification bearing that name, an address and a date of birth. A routine electronic verification service returned an unfavorable result on the check, and Stephens left without retrieving his identification. The store employee became suspicious, observed Stephens leave in a white Bonneville driven by a white male, took the license plate number, and called police. Police took a report and told the store employee to call them if Stephens came back. Shortly thereafter, Stephens called the store and asked about retrieving his ID. When he showed up and saw the police, Stephens began running towards Scott's car parked nearby. After detaining Stephens and confirming that it was the same car seen earlier, an officer approached Scott's car and began to question him.

Scott showed the officer his pager and indicated he was waiting for a call. Scott denied knowing Stephens. The officer concluded Scott was lying and was involved with Stephens in a crime. He then ordered Scott out of the vehicle and searched the passenger compartment of the car, including the glove compartment where he found a hypodermic needle. Scott was placed under arrest for possession of the needle. The car was impounded, and an inventory discovered employee identification cards and a birth certificate the prosecution offered as evidence in Scott's trial.

ISSUE: Does reasonable suspicion of the fraud of attempting to pass a bad check, sufficient to justify an investigative stop under *Terry v. Ohio*, alone amount to a suspicion that the suspect is armed and dangerous sufficient to justify a frisk?

HELD: No.

DISCUSSION: Police had sufficient reasonable suspicion to justify a detention of Scott under *Terry v. Ohio*. But, that alone was not enough to justify the *Terry* frisk of the car and the discovery of the hypodermic needle. Therefore, the arrest, the impounding of the car and the inventory were illegal. The documents were seized illegally.

Police may frisk a suspect, and the passenger compartment of the car in which the suspect rides, only on reasonable suspicion that the suspect is armed and dangerous. When the officer suspects a crime of violence, the same information that will support an investigatory stop will without more support a frisk. This rule encompasses crimes commonly associated with violence even though the criminal act itself may be nonviolent, such as large-scale drug trafficking. The Third Circuit has ruled that reasonable suspicion of fraud justifies a frisk, concluding that

those who perpetrate a fraud in broad daylight may well arm themselves to make an escape. However, the First Circuit refuses to follow that ruling and holds that to conduct a self-protective search for weapons, an officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. (Not all was lost. The court went on to rule that the documents were admissible under the Inevitable Discovery Doctrine.)

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U.S. v. Otero-Mendez
273 F.3d 46
December 10, 2001

SUMMARY: Under 18 USC 2119, evidence that the aider and abettor in a carjacking knew his co-defendants would use firearms in the carjacking is sufficient to prove defendant specifically intended to cause death or serious bodily harm.

FACTS: Defendant was the driver in a car in which four others were passengers. Previously, defendant and two of the passengers had discussed finding new wheel rims for the defendant's car. While riding around, they saw a Nissan 300ZX and decided to forcibly take its wheel rims. When the Nissan stopped in front of a residence, the defendant pulled up next to it, and two passengers got out of the car and pulled their weapons. Shots were fired. The driver of the Nissan was killed and one of the passengers in defendant's car was injured. 18 USC 2119 requires proof of the specific intent to cause death or serious bodily harm.

ISSUE: As to the aider and abettor, can the intent to cause death or serious bodily harm be inferred from his knowledge that co-defendants would use firearms in the commission of the crime?

HELD: Yes.

DISCUSSION: Although there was no prior discussion of the use of firearms to commit the carjacking, defendant knew that the others were carrying guns when they got into his car. The guns were pulled out and gunfire erupted immediately as they exited the car. This uncontradicted testimony provides sufficient grounds for a reasonable jury to find that defendant knew to a practical certainty that the others intended to use deadly force.

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U.S. v. Diehl
2002 U.S. App. LEXIS 283
January 9, 2002

SUMMARY: In determining the limits of "curtilage," four specific factors must be addressed: 1) the proximity of the area to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and 4) steps taken by the resident to protect the area from observation by people passing by. However, the centrally relevant consideration is

whether the area is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection.

FACTS: Appellants' property, a 17 acre tract in a very rural and sparsely populated part of western Maine, is reached only by proceeding some 700 feet along a discontinued town road, then ascending a 500-foot dirt driveway, which is bordered closely by forest and contains a dogleg turn shutting off a view of the full length. "No Trespassing" signs are posted at the beginning and near the end of the driveway. The driveway terminates in a clearing of less than half an acre. In the clearing is a crude camp, occupied by appellant Diehl, his wife, and appellant Cumming, an outhouse, a pen for animals, and a line for drying laundry. At the time of the search in February 2000, the clearing was covered by snow except for a plowed parking area for vehicles. Beyond the camp, a path leads to a 20-by-72-foot wood storage building, which houses appellants' marijuana production operation.

At about 3 a.m. on February 24, 2000, Milligan, an agent with the Maine Drug Enforcement Agency, and two other officers went on foot to "the non-curtilage area of the property" to conduct a thermal detection inspection of the camp and storage building. Milligan describes what happened as follows: While standing on the dirt road away from the curtilage of the camp, I pointed a hand-held thermal detection device at the camp and began my survey. While doing so, I could hear a loud "hum" which is consistent with noise made from ballasts providing power to high intensity lights commonly used in indoor marijuana cultivation operations. I could also hear at least two males laughing and talking inside the camp. Moments later, I could smell a strong odor of what I recognized to be growing marijuana coming from the property in question. Since I could smell marijuana and realized that suspects were awake inside the camp, I decided to terminate the thermal inspection and withdraw from the property to ensure officer safety.

Based upon that information along with other facts developed during the investigation, a search warrant was issued the next day. The search yielded 360 growing marijuana plants, 483 "cuttings" in a rooting compound, scales, grow lights, seeds, and harvested marijuana.

The government took the position that Milligan's report that he smelled marijuana during that pre-warrant visit was necessary to establish the probable cause justifying issuance of the warrant. Therefore, if Milligan obtained the olfactory evidence through conduct that violated the Fourth Amendment, the warrant was defective and the resulting search and seizure of evidence was unlawful.

The Trial Court ruled that Milligan was not within defendants' curtilage at the time he smelled the marijuana and denied the Motion to Suppress.

ISSUE: Was Milligan unlawfully within the defendant's curtilage at the time he smelled the marijuana?

HELD: Yes.

DISCUSSION: The curtilage question turns on whether the area is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection. In U.S. v. *Dunn*, 480 U.S. 294

(1987), the Supreme Court gives an unusual combination of specific and general guidance on this issue: 1) the proximity of the area to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and 4) steps taken by the resident to protect the area from observation by people passing by.

1) The proximity of the area to the home.

The Trial Court concluded, and the Circuit Court accepted, that Milligan was approximately 82 feet from the camp at the time he smelled the marijuana. Such a distance is not determinative. There are cases where distances under 82 feet have been held not to be within the curtilage and other cases where greater distances have been held to be within it. The Circuit Court did note the "absence of any indications of a boundary closer to the camp," and that "in a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control."

2) Whether the area is included within an enclosure surrounding the home.

The Circuit Court rejected the Trial Court's reasoning that there were "no artificial enclosures that might assist the curtilage analysis…." Artificial enclosures for most homes, as the *Dunn* Court observed, will be clearly marked to define the area around the home to which the activity of home life extends. But in this case, the private interests of the inhabitants extended throughout the fairly small clearing already enclosed by forest, with no reason for internal demarcation. Reading the word "enclosure" in *Dunn* to require an artificial barrier is unduly narrow.

3) The nature of the uses to which the area is put.

There was testimony about the uses to which the clearing around the camp had been put. Because the living quarters were minimal and poorly soundproofed, appellants and Mrs. Diehl testified that they would go outdoors to talk, use the portable telephone, meditate, read, write letters, play with pet goats, play frisbee and horseshoes, usher in the new year, and hang laundry on the line. Cumming occasionally would urinate there if the camp bathroom were occupied, and he sunbathed in the nude. The Diehls would repair to a bench for intimate times, even well into the fall. Milligan had no knowledge of such activities. When he made his approach, snow was on the ground and one vehicle was buried and another parked on the plowed area.

The Trial Court concluded that there was no objective basis for Milligan to conclude that the defendants used the location in which he stood for the intimate activities of the home. The Circuit Court rejected this perspective, refusing to require that the officers possess objective evidence of intimate uses before the curtilage protection is present. The Circuit Court concluded that the Trial Court's position would turn the concept upside down, presuming the absence of curtilage until and unless the contrary appears to the officers. It is the actual use to which the area is put, not the officer's knowledge of it, that controls.

4) Steps taken by the resident to protect the area from observation by people passing by.

Evidence addressed the steps taken by appellants to protect their privacy. They had refused to allow a straight swath to be cut for a power line from the road to their buildings, and instead cleared an indirect path so that the

line could follow the bend in the driveway. They had their mail delivered to a post office box in town. They instructed UPS to leave parcels at a store. They reached an understanding with their nearest neighbor to respect their passion for privacy. In the three months preceding the events in question, they had received only three visitors: the prior owner, the tax assessor, and local police who were trying to unearth some information about appellants.

The Circuit Court rejected the Trial Court's conclusion that it was "unreasonable for them to expect that no visitors would ever wander up the driveway or through the woods to stand within the perimeter of the clearing or in the vicinity of the utility pole." Our task is to look at "the steps taken by the resident to protect the area from observation by people passing by." The Circuit Court held that the facts concerning the location of the property, the bend in the long driveway, the surrounding woodland, and the efforts of the inhabitants to discourage mail delivery and visits from neighbors and officials all seem to have created a locus as free from observation by passersby as one could conceive.

The Circuit Court concluded that the entire clearing, including the area from which Milligan made his observations, was intimately tied to the home itself and should be placed under the home's 'umbrella' of Fourth Amendment protection. Therefore, Milligan's intrusion into the curtilage violated the Fourth Amendment. His detection of the odor of marijuana could not be used to establish the probable cause justifying the warrant. (The Court went on, however, to uphold the search and seizure on the basis of the Good Faith exception to the Exclusionary Rule.)

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2nd CIRCUIT

U.S. v. Haqq
2002 U.S. App. LEXIS 764
January 17, 2002

SUMMARY: A reasonable expectation of privacy in a premises does not automatically extend to all containers within the premises to give standing to contest the legality of a search of such container.

FACTS: Defendant, a convicted felon, lived in a two bedroom apartment in New York City rented by his fiancée. Four, possibly five, people, including defendant lived there. Police officers went to the apartment to arrest defendant on several outstanding arrest warrants. When they were let in by another resident, they immediately handcuffed that person and defendant and began a protective sweep of the apartment. In one of the bedrooms, an officer noticed a black nylon suitcase, searched it and discovered three guns. Defendant later signed a written statement admitting that the guns were his. He also consented to a further search of the apartment which turned up two more weapons and ammunition. He was charged with illegal possession of weapons by a convicted felon.

Defendant moved to suppress the first weapons as the result of an illegal search, his statement as fruit of the poisonous tree, and the subsequent weapons as the result of involuntary consent. The government conceded that if the search of the suitcase was illegal, then all the guns and defendant's statement were inadmissible. But, the government argued that the defendant had no reasonable expectation of privacy in the suitcase and, therefore, could not contest the legality of that search.

The trial court ruled that the defendant's expectation of privacy in his home was sufficient to permit him to object to the seizure of objects which were not, in fact, in plain view. The trial court held that it was unnecessary to resolve the factual dispute over defendant's expectation of privacy in the suitcase since he had a reasonable expectation of privacy to object to an allegedly unlawful search of his home.

ISSUE: Does a reasonable expectation of privacy in a premises automatically extend to all containers within the premises to give standing to contest the legality of a search of such container?

HELD: No.

DISCUSSION: Fourth Amendment rights are personal rights that may not be vicariously asserted. A defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party. To mount a successful Fourth Amendment challenge, a defendant must demonstrate that he personally has an expectation of privacy in the place searched.

When considering the legality of a search of an object within a home, courts have properly focused on the defendant's expectation of privacy in the *object* apart from his expectation of privacy in the home. Defendant has standing to contest the legality of the search of the premises, but not the search of containers belonging to another in the premises.

The trial court erred in holding that defendant's Fourth Amendment rights were violated by the search of the suitcase without first determining that the defendant had a reasonable expectation of privacy in that suitcase.

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3rd CIRCUIT

U. S, v. DeSumma
272 F.3d 176
November 29, 2001

SUMMARY: The fruit of the poisonous tree doctrine does not prevent the admission of real evidence obtained as a result of defendant's statement taken in violation of *Miranda* but otherwise voluntary.

FACTS: On September 29, 1998, the defendant was arrested pursuant to a warrant in the parking lot of a club. The defendant was handcuffed and searched to determine if he was carrying any weapons. Failing to detect anything, an agent asked the defendant if he had any weapons or firearms in his possession. The defendant replied that there was a weapon in his automobile, and gave the agent the pad combination to open his car door. Until this point, the agents had not displayed any firearms, used any force or threats, nor had they given any *Miranda* warnings. The agents opened the car and retrieved a loaded pistol from a briefcase. At trial, the defendant filed a motion to suppress his statement regarding having a pistol in his car and the pistol itself. The District Court found that because *Miranda* warnings had not been given, the defendant's statement that a gun was in his car should be

suppressed. The District Court, however, ruled that the pistol itself was admissible and the fruit of the poisonous tree doctrine did not apply because the defendant's statement was voluntary, albeit inadmissible, under *Miranda*. The defendant appealed.

ISSUE: Does the fruit of the poisonous tree doctrine prevent the admission of real evidence obtained as a result of defendant's statement taken in violation of *Miranda* but otherwise voluntary?

HELD: No.

DISCUSSION: In *Oregon v. Elstad*, 470 U.S. 298 (1985), the defendant gave an incriminating statement before receiving *Miranda* warnings. Later, after having been advised of his *Miranda* rights, the defendant gave a written statement that was introduced at trial. The Supreme Court rejected the defendant's contention that the second confession was the fruit of the poisonous tree. The Court explained that the purpose of the Fourth Amendment's exclusionary rule is "to deter unreasonable searches, no matter how probative their fruits." The *Miranda* exclusionary rule, in contrast, serves the Fifth Amendment and applies more broadly than the Amendment itself. Thus, a voluntary statement that would be admissible under the Amendment may be barred because of the lack of a *Miranda* warning. *Elstad* emphasized "voluntary statements remain a proper element in law enforcement" and admissions of guilt, "if not coerced, are inherently desirable." Applying the fruit of the poisonous tree doctrine where the evidence is obtained as the result of a voluntary statement would be inconsistent with deterring improper police conduct and the goal of assuring trustworthy evidence. No constitutional violation occurs in such a situation, unlike the circumstances where an unreasonable search occurs or a coerced confession is obtained. The defendant attempted to rely upon the Supreme Court's recent ruling in *Dickerson v. United States*, 530 U.S. 428 (2000), to argue that the "fruits" doctrine should apply because the Court found *Miranda* to be a "constitutional rule." The court noted that the Supreme Court appeared to have anticipated this argument in *Dickerson* and rejected it. The Court explained in *Dickerson* that "our decision in *Elstad* -- refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases -- does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Dickerson* thus continued to observe the distinction between *Miranda's* application to cases involving the Fifth, rather than the Fourth, Amendment. Ultimately, the Fifth Amendment prevents the use of the non-*Mirandized* statement rather than the introduction of derivative evidence.

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5th CIRCUIT

U.S. v. Green
272 F. 3d 748
November 9, 2001

SUMMARY: Complying with a law enforcement request for help in opening a locked container during an otherwise valid search is a "testimonial act" to which Fifth Amendment protections apply. When such assistance is given in violation of *Miranda*, the fact that the defendant opened the lock cannot be used against him in trial.

FACTS: Defendant was convicted in 1988 of conspiracy to possess unregistered machine guns. Because of this felony conviction, he could no longer legally possess any firearms. BATF agents received a confidential tip that defendant had firearms. After corroborating the tip with further investigation, agents were able to obtain a search warrant for defendant's house. They took him into custody at the local post office and advised him of his *Miranda* rights. Defendant said he wanted to talk to his lawyer. Agents declined this request, searched defendant and his truck, and took him to his house.

Defendant was advised of his *Miranda* rights again when they reached his house. He repeated his request to see his lawyer. Told he could do that later, defendant was then asked whether there were any "weapons in the house or any public safety hazards that could harm anyone." Defendant showed agents a briefcase and a safe, both of which were secured by combination locks. At the agents' request, defendant unlocked the containers. Three pistols were found in the briefcase and a shotgun was found in the safe.

Defendant was charged with being a convicted felon in possession of firearms. To establish that Green constructively possessed these secured weapons, agents testified that defendant told the officers where these firearms were located and opened the combination locks.

ISSUE: Can Defendant's act of unlocking the briefcase and safe be used against him in trial to prove possession?

HELD: No.

DISCUSSION: This case illustrates the need to comply with *Miranda* in order to use the act of producing real evidence against a defendant in his trial. Defendant's assistance was certainly convincing evidence. It showed that he not only knew the firearms were in his house but also that he had access to them despite the locks. But his incriminating assistance was, in the words of the court, "testimonial and communicative in nature." After defendant had invoked his right to counsel twice, further questioning was improper. Because his "responses" -finding the firearms and opening the locks- were obtained in violation of the Fifth Amendment and *Miranda*, such evidence could not be used against him.

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U.S. v. Roberts
274 F.3d 1007
December 4, 2001

SUMMARY: Reasonable suspicion will justify a non-routine, outbound search at the border or functional equivalent to the border.

FACTS: On July 7, a Customs agent in Louisiana contacted Customs agents at Houston International Airport. The Louisiana agent reported that: (1) Defendant would be flying non-stop to Paris that afternoon from the Houston airport; (2) when traveling, "he typically carried a computer and diskettes containing child pornography; and (3) "he usually carried the diskettes in a shaving kit." However, defendant never came to the airport that day.

About seven weeks later (August 24), another Louisiana Customs official notified the Houston Customs agents that defendant would arrive at the Houston airport the next day from Louisiana and "take another international flight." They also provided a photograph of the defendant. On the 25th, a local sheriff told the Houston Customs agents that the defendant "was suspected of traveling with child pornography on diskettes that would be packed in a shaving kit."

When the defendant arrived at the Houston airport as scheduled, Customs agents organized an outbound inspection for the Paris flight that defendant was scheduled to board. When the defendant was inspected, agents discovered and seized a laptop computer and a shaving kit containing diskettes. Incident to the non-custodial inspection, defendant made several damaging admissions as well. The computer and diskettes contained more than 5,000 images, most of which were child pornography. Defendant was convicted of two counts of possessing and transporting child pornography and was sentenced to 51 months imprisonment and 3 years of supervised release.

ISSUE: Is reasonable suspicion sufficient to justify a non-routine, outbound search at the border or functional equivalent to the border?

HELD: Yes.

DISCUSSION: Law enforcement officials may conduct a non-routine outbound search if: (1) The search occurs at the border or its functional equivalent; (2) there is reasonable suspicion that the outbound suspect to be searched "will imminently engage in the felonious transportation of specific contraband in foreign commerce;" and (3) the search is "relatively unintrusive" and limited to the luggage or other area which is suspected to contain the contraband

The information received by the Houston Customs officials was sufficient to amount to reasonable suspicion that the defendant was carrying contraband. As the court enumerated: "(1) Roberts; (2) would fly into the Houston airport; (3) from Louisiana; (4) on 25 August 1998; (5) continue on an international flight; (6) carrying a shaving kit; (7) holding diskettes; (8) containing child pornography." This report was corroborated when agents spotted the defendant getting off a flight from Louisiana and confirmed from a flight data base that he was scheduled to fly to Paris. Reasonable suspicion existed on these facts.

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9TH CIRCUIT

U. S. v. Javier Valencia-Amezcua
2002 U.S. App. LEXIS 853
January 22, 2002

SUMMARY: Police may arrest a person without a warrant if the arrest is supported by probable

cause. Probable cause to arrest exists if "under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that defendant had committed a crime." The experienced judgments made by law enforcement officers involved in the investigation are given significant weight. "In drug investigations, the court may consider the experience and expertise of the officers involved. This experience and expertise may lead a trained narcotics officer to perceive meaning from conduct which would otherwise seem innocent to the untrained observer."

FACTS: Two officers with the Tillamook, Oregon narcotics team observed a suspected drug offender, Valencia-Rodriguez, go to a car wash and hand an envelope to a man under investigation for narcotics violations. Later that day, the officers conducted a traffic stop of the one receiving the envelope and found it to contain methamphetamine. The officers also stopped Valencia-Rodriguez, and he consented to a search of his house. At the house, the officers found defendant and two other men sitting on a bed in an upstairs bedroom. The officers then obtained a written consent to search the house from both owners.

In the first floor bathroom the officers found several bags of methamphetamine and a set of electronic scales. In one of the bedrooms, the police found electric fryers, large plastic garbage cans and several cans of denatured alcohol, a substance used to make methamphetamine. In the room where the defendant and two other men were sitting, the police found a hidden door, only visible because it was partially open. The disguised door was blocked by the bed where defendant and the two other men were sitting. Behind the door, they discovered a secret room complete with a gas cylinder, several plastic tubs and a large plastic storage container full of suspected methamphetamine. Based on the incriminating nature of their findings, the officers arrested defendant and the other people on drug charges.

After he was arrested, defendant was taken to the local jail and searched. Cashier receipts for rubber gloves, multiple gallons of denatured alcohol and ziplock bags (materials are used in the production of methamphetamine) were found on his person. Defendant was charged and convicted under 21 U.S.C. §841(a)(1) and received 151 months of imprisonment. He contends on appeal that there was no probable cause for his arrest which was, therefore, unlawful, and that receipts found on his person were the fruit of the poisonous tree of his illegal arrest.

MAIN ISSUE: Under the totality of the circumstances, was defendant's arrest based upon probable cause?

HELD: Yes.

DISCUSSION: There is no doubt that police may arrest a person without a warrant if the arrest is supported by probable cause. Probable cause exists if "under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that defendant had committed a crime."

The experienced judgments made by law enforcement officers involved in the investigation are given significant weight. "In drug investigations, the court may consider the experience and expertise of the officers involved. This experience and expertise may lead a trained narcotics officer to perceive meaning from conduct which would otherwise seem innocent to the untrained observer."

The court considered these legal principles as key in determining the legality of defendant's arrest. The officers were conducting a consent search of the house were he was found. During this search defendant was found sitting in a room with a hidden door covered in wall paneling. He was sitting on a bed with two others blocking the door in an apparent attempt to conceal the door. Beyond the door lay a secret room full of drug equipment used to produce methamphetamine.

Mere presence with known drug offenders is insufficient to give probable cause for an arrest. However, in this case the court found that defendant's behavior went beyond mere presence. His proximity to the hidden door and being seated on the bed blocking the door with the others, suggested that he had participated in the drug production and had exited from the hidden room. Under the totality of the circumstances a reasonable, prudent narcotics officer could believe that there was a fair probability that defendant was involved in criminal activity in the house.

In order to refute defendant's assertion that he had just been visiting the house for the first time, the court said it was helpful for the jury to hear from an experienced narcotics officer that large-scale drug operations generally do not allow unaffiliated individuals near the operation. The court also considered it as testimony addressing modus operandi of large drug operations. The court also found that the testimony of an experienced DEA agent, describing a typical operation of the large-scale manufacture of methamphetamine, was relevant and not unduly prejudicial. "Expert testimony regarding the structure of criminal enterprises is admissible to help the jury assess the defendant's involvement in the enterprise

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10TH CIRCUIT

U.S. v. Callarman
2001 U.S. App. LEXIS 26204
December 7, 2001

SUMMARY: A traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has a reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring. While case law indicates that probable cause is a sufficient ground for a stop, probable cause is not necessary for a stop. Rather, only the lesser requirement of reasonable suspicion is necessary.

FACTS: A Topeka Police Officer was conducting surveillance on a "head shop," a slang term for a drug paraphernalia store. He observed the defendant enter the head shop, spend five to seven minutes inside and then return to a waiting car driven by a woman, Sonya Streeter. Streeter proceeded through the parking lot, stopped at an exit and turned right onto a city street. The officer contended that she did not use her turn signal. The officer followed the car and noticed a crack in the car's front windshield. After he stopped the car and approached the vehicle, the officer saw defendant reaching down to the floor of the car. The officer became concerned for his

safety and ordered defendant out of the car. The officer then noticed a knotted plastic bag, which he believed to be cocaine, on the floor of the car. After it was confirmed as cocaine, defendant was arrested. Defendant was prosecuted and convicted pursuant to 21 U.S.C. §844(a), Possession of a Controlled Substance.

ISSUE: Does the Fourth Amendment require traffic stops to be based on probable cause rather than reasonable suspicion of a traffic violation?

HELD: No.

DISCUSSION: Clearly, a traffic stop, however brief, constitutes a seizure within the meaning of the Fourth Amendment. But, it is a relatively brief encounter and is more analogous to a *Terry* stop than to a formal arrest. Previously, the 10th Circuit set forth the standard governing the reasonableness of traffic stops: [A] traffic stop is valid if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring. *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir 1995). The court quotes the United States Supreme Court that a reasonable suspicion is a "particularized and objective" basis for suspecting the person stopped of engaging in criminal activity. *United States v. Cortez*, 449 U.S. 41, 417-418, 66 L.Ed.2d 621, 101 S. CT 690 (1981). Although probable cause will certainly justify a traffic stop, it is not required.

The 10th Circuit stated that because the reasonable articulable suspicion standard is the accepted and appropriate standard, the only question left was whether the police officer's suspicions of a traffic violation were particularized and objective, and thus, reasonable. The officer testified that he stopped the vehicle for two reasons, driving with a cracked windshield and failing to signal while turning. Kansas law prohibits driving a motor vehicle with a cracked windshield which obstructs the driver's clear view. In this case, the crack was 12 inches across and 6 inches high, large enough that the police officer could see it from behind the car. This gave the officer reasonable articulable suspicion to believe the crack obstructed the view of the driver and was in violation of Kansas law. Therefore, the traffic stop was justified and the conviction affirmed.